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Roger Bogne v Istana Securities Ltd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)(NCVC)-1740–08 OF 2017
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND KAMALUDIN MD SAID JJCA
2 OCTOBER 2018

C

Civil Procedure — Setting aside — Judgment in default — Respondent filed action against appellant for failure to repay loan — Respondent applied to serve process out of jurisdiction at appellant's address in South Africa — Judgment in default ('JID') entered against appellant — Whether email stating that service affected at residence of appellant could be considered as 'official certificate' as provided under O 11 r 5(5) of the Rules of Court 2012 — Whether JID obtained by respondent irregular judgment — Rules of Court 2012 O 11 rr 5(5) & 6

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The respondent had filed an action against the appellant for failure to repay a short-term loan in the sum of AUD300,000 and applied to serve process out of jurisdiction at the address of the appellant in South Africa. Vide an email dated 9 July 2015 ('the said email'), the third secretary at the Malaysian High Commission in Pretoria, South Africa had informed that the service was affected at the residence of the appellant and that a member of his family accepted the notice of writ. The appellant failed to enter appearance and defence, hence, the respondent entered judgment in default ('JID') on 1 December 2015. The appellant had filed an application to set aside the JID but the said application was dismissed by the learned deputy registrar. On appeal, the High Court judge accepted the submission of the respondent that the said email was the 'official certificate' as mentioned in O 11 r 5(5) of the Rules of Court 2012 ('the ROC'). As such, he was satisfied that the service was properly affected on the appellant and the JID was regular. Based on the above findings, the learned judge dismissed the appellant's appeal, hence, the appellant filed the present appeal. The appellant's main ground of appeal was that the JID obtained by the respondent on 1 December 2015 was alleged to be irregular judgment.

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Held, allowing the appeal with costs of RM15,000 here and below subject to allocator fee:

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(1) The request to serve the writ of summons with statement of claim on the appellant at the appellant's address in South Africa was made pursuant to O 11 r 6 of the ROC. As such, an official certificate stating that a notice of a writ as regards which O 11 r 6 had been complied with had been

served on a person personally, or in accordance with the law of the country in which service was affected ought to be produced as evidence of the facts so stated (see para 36).

(2) There was a blatant disregard by the learned judge of the words 'official certificate' as provided under O 11 r 5(5) of the ROC. The said email was not the official certificate mentioned in O 11 r 5(5) of the ROC. This was because the said email did not state that the notice of writ was served personally; or that the notice of writ was served in accordance with the law of South Africa. The failure to state in the email that the service was affected in accordance with the law of South Africa was fatal. Further, the learned judge erred in placing the burden on the appellant to prove that services was not done in accordance with the law of South Africa. The burden would only be shifted to the appellant once the respondent complied with O 11 r 5(5) of the ROC. Therefore, the service of the notice of writ was irregular and the JID ought to have never been entered by the High Court (see paras 35, 37–38 & 42–44).

(3) It was trite law that where a JID could be proved to be null and void on the grounds of illegality or jurisdictional error, it had to be set aside ex debitio justitiae. In the present case, the JID was irregularly obtained, as such, the appellant was entitled as a matter of right to have the JID set aside (see paras 17, 45 & 47).

[Bahasa Malaysia summary

Responden telah memfailkan tindakan terhadap perayu kerana kegagalan untuk membayar balik pinjaman tempoh pendek berjumlah AUD300,000 dan memohon untuk disampaikan proses di luar bidang kuasa di alamat perayu di Afrika Selatan. Melalui emel bertarikh 9 Julai 2015 ('emel tersebut'), setiusaha ketiga di Pesuruhjaya Tinggi Malaysia di Petroria, Afrika Selatan telah memberitahu bahawa penyampaian itu telah dilaksanakan di kediaman perayu dan bahawa seorang daripada ahli keluarganya telah menerima notis writ itu. Perayu telah gagal memasukkan kehadiran dan pembelaan, justeru, responden telah memasukkan penghakiman ingkar ('PI') pada 1 Disember 2015. Perayu telah memfailkan permohonan untuk mengetepikan PI itu tetapi permohonan tersebut telah ditolak oleh timbalan pendaftar. Atas rayuan, hakim Mahkamah Tinggi telah menerima hujah responden bahawa emel tersebut adalah 'official certificate' sepertimana dinyatakan dalam A 11 k 5(5) Kaedah-Kaedah Mahkamah 2012 ('KM'). Oleh itu, beliau berpuas hati bahawa penyampaian tersebut telah dilaksanakan sewajarnya ke atas perayu dan PI itu adalah teratur. Berdasarkan dapatan di atas, hakim yang bijaksana tleah menolak rayuan perayu, justeru, perayu telah memfailkan rayuan ini, Alasan utama rayuan perayu adalah bahawa PI tersebut yang telah diperoleh oleh responden pada 1 Disember 2015 adalah dikatakan penghakiman di luar aturan.

Diputuskan, membenarkan rayuan dengan kos RM15,000 di sini dan di bawah tertakluk kepada fi alokatur:

(1) Permohonan untuk menyampaikan writ saman bersama penyataan tuntutan ke atas perayu di alamat perayu di Afrika Selatan telah dibuat menurut A 11 k 6 KM. Oleh itu, pengesahan rasmi yang menyatakan bahawa notis writ berkenaan A 11 k 6 telah dipatuhi yang tleah disampaikan ke atas seseorang secara kendiri, atau menurut undang-undang negara di mana penyampaian itu telah dilaksanakan patut dikemukakan sebagai keterangan fakta sebagaimana dinyatakan (lihat perenggan 36).

(2) Jelas hakim yang bijaksana tidak mengendahkan perkataan-perkataan 'officail certificate' sepertimana diperuntukkan di bawah A 11 k 5(5) KM. Emel tersebut bukan pengesahan rasmi yang dinyatakan dalam A 11 k 5(5) KM. Ini adalah kerana emel tersebut tidak menyatakan bahawa notis writ itu telah disampaikan secara kediri; atau bahawa notis writ itu telah disampaikan menurut undang-undang Afrika Selatan. Kegagalan untuk menyatakan dalam emel itu bahawa penyampaian tersebut menurut undang-undang Afrika Selatan adalah mudarat. Selanjutnya, hakim yang bijaksana terkhilaf kerana meletakkan beban ke atas perayu untuk membuktikan bahawa penyampaian tersebut tidak dilakukan menurut undang-undang Afrika Selatan. Beban tersebut hanya berpindah kepada perayu setelah responden mematuhi A 11 k 5(5) KM. Oleh itu, penyampaian notis writ itu adalah di luar aturan dan PI tersebut tidak patut dimasukkan oleh Mahkamah Tinggi (lihat perenggan 35, 37–38 & 42–44).

(3) Adalah undang-undang tetap bahawa di mana PI boleh dibuktikan sebagai terbatal dan tidak sah atas alasan menyalahi undang-undang atau kesilapan bidang kuasa, ia perlu diketepikan ex debitio justitiae. Dalam kes ini, PI tersebut telah diperoleh diluar aturan, dengan itu, perayu berhak untuk mengetepikan PI tersebut (lihat perenggan 17, 45 & 47).]

Notes

For cases on judgment in default, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8798–8804.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Merbok Hilir Bhd v Sheikh Khaled Jassem bin Mohammad Jassem Al-Thani (t/a Petroserv General Trading Establishment) and other appeals [2013] 5 MLJ 407; [2013] 8 CLJ 309, CA (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, PC (refd)

A *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)

Legislation referred to

Moneylenders Act 1951

B Rules of Court 2012 O 10 r 1, 1(1), O 3 r 5, O 11, O 11 rr 5, 5(1), (3), (5), (5)(a), (5)(b), (5)(c), (6), (7), 6, 6(1), (2), (3), (6), 7, O 62 r 6

Uniform Rules of Court [SA] r 4(1)(a)(ii)

C **Appeal from**: Suit No LBN-22NCVC-8/12 of 2014 (High Court, Labuan)

Khabir Dhillon (Bhavanash Sharma with him) (Bhavanash Sharma) for the appellants.

Chetan Jethwani (Pek Chin Choo with her) (Govindasamy & Pek) for the respondent.

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Kamaludin Md Said JCA:

INTRODUCTION

E **[1]** This is the appellant's (defendant) appeal against the decision of the High Court of Sabah and Sarawak at Federal Territory of Labuan who dismissed his appeal on 5 July 2017 and affirmed the decision of the deputy registrar given on 20 March 2017 dismissing the application of the appellant to set aside a judgment in default ('JID') that was entered against him on 1 December 2015.

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BRIEF FACTS

[2] The respondent ('the plaintiff') had filed an action against the appellant ('the defendant') for failure to repay a short term loan in the sum of AUD300,000 (Australian Dollar three hundred thousand only). The parties entered into an agreement on 11 October 2011. The loan was to be repaid with a monthly interest of 3.5% or A$10,500 per month. The repayment period was four months with an option to extend for a period of not more than two months on the same terms and conditions. The plaintiff averred that no payment was received from the defendant.

[3] The plaintiff is an offshore company that is registered in Labuan, the defendant is a Cameroon passport holder who resides in South Africa. The plaintiff pleaded that the money was lent to the defendant because of the request of its beneficial owner, one David Porter who had developed 'a father and son' relationship with the defendant. The collateral for the loan was the house of the defendant at No 61, Herbert Road, Bryanston, South Africa, 5116.

[4] The plaintiff pleaded that the demands for repayment addressed to the defendant since 2012 had been in vain. They commenced this action in December of 2014 and applied to serve process out of jurisdiction on 22 January 2015 at the address of the defendant in South Africa. Subsequently, the plaintiff's solicitors were notified by the court registrar that the defendant was served with the writ and summons on 3 July 2015.

[5] Upon the failure of the defendant to enter appearance and defence, the plaintiff entered JID on 1 December 2015. The plaintiff also sent a sealed copy of the JID order to the address of the defendant in South Africa although there was no requirement to do so as the defendant did not enter appearance. Thereafter, the plaintiff instructed solicitors in South Africa to commence execution proceedings via what is known as the 'Provisional Sentence Summons' ('PSS').

[6] The defendant sent an email to the beneficial owner (David Porter) and appealed for more time to make payment. On 18 August 2016, the Sheriff of the South African court attached the movable properties of the defendant. Finally, on 19 August 2016, the defendant filed an application at the South African Court to set aside the PSS. On 25 October 2016, the defendant filed the application in the Labuan High Court to set aside the JID entered on 1 December 2015. The defendant also sought leave to file the application out of time as he was late by ten months by quoting O 3 r 5 in the notice of application. However, in the body of the notice of application, the defendant did not include a prayer to extend time.

[7] The learned deputy registrar ('DR') refused the application of the defendant to extend time. She did not accept the reasons advanced by the defendant for the delay.

[8] She also found that service was properly effected in South Africa and that the judgment is regular. She also found that the defendant did not have a prima facie defence. She rejected the argument that the loan agreement was money lending transaction that is void and unenforceable.

[9] Aggrieved by the decision of the DR, the defendant via notice of appeal to a judge in chambers dated 20 March 2017 appealed against the decision of the DR.

[10] The defendant's appeal was heard by the High Court judge ('the learned judge') on 5 July 2017. Having read the defendant's application dated 13 September 2016 and the affidavit in support of the application dated 3 October 2016, plaintiff's affidavit in reply dated 25 November 2016, defendant's affidavit in reply dated 13 December 2016 and plaintiff's second

affidavit in reply dated 6 January 2017, defendant's submission and the plaintiff's submission, the learned judge dismissed the defendant's appeal with costs of RM7,000 subject to payment of allocator fees to be paid to the government.

[11] The grounds of judgment of the learned judge is at pp 2–22 of the *rekod rayuan tambahan* ('RRT'). The learned judge in his grounds of judgment had concluded his finding that the defendant had disclosed a defence on the merits that the loan agreement was in reality a money lending transaction that offended the Moneylenders Act 1951. In other words, the learned judge disagreed with the finding of the DR that the defendant did not have a prima facie defence. However, he was of the same view with the DR that the application should be dismissed because the defendant had failed to explain the delay in making this application. The defendant only filed the application some ten months later ie in October 2016 and the reasons given by the defendant are frivolous. He also agreed with the DR and found as a fact that service was properly affected in South Africa in July 2015 and the JID was entered in December of 2015. The learned judge found the JID to be regular.

THE APPEAL

[12] The defendant advanced several grounds of appeal as stated in his amended memorandum of appeal. The defendant's main ground is that that the JID obtained by the plaintiff on 1 December 2015 was alleged to be irregular Judgment.

[13] The learned judge had found the service of the writ of summons on the defendant in South Africa had been properly affected under the Rules of Court 2012 therefore, the JID obtained by the plaintiff against the defendant on 1 December 2015 was regular judgment.

[14] The appellate court normally intervene and correct the decision of the lower court if the decision is perverse or can be shown that the decision can be proved or otherwise to have gone plainly wrong. The jurisdiction of the Court of Appeal to intervene against a decision of the High Court has to rest on settled principles; the court should only upset a decision of the High Court where there is a clear error leading to a perverse finding or resulting in miscarriage of justice, particularly where the lower court has decided on the basis of discretion (see: *Merbok Hilir Bhd v Sheikh Khaled Jassem bin Mohammad Jassem Al-Thani (t/a Petroserv General Trading Establishment) and other appeals* [2013] 5 MLJ 407; [2013] 8 CLJ 309; and *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

[15] In this regard, we also wish to echo the statement by the Privy Council

in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 at p 229:

> The principles upon which a court will act in reviewing the discretion exercise by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* [1942] AC 130 per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473). Upon question of procedure the Board is slow to interfere with the discretion exercised by a lower court (*Mayor of Montreal v Brown & Anor* (1876) 2 App Cases 168).

OUR DECISION

[16] We heard this appeal on 20 July 2018. The counsel for the defendant and counsel for the plaintiff had made oral submissions and also relying on their written submissions filed herein.

[17] After reading the learned judge's ground of judgment and the record of appeal, we were satisfied that the learned judge's decision contains appealable error for us to intervene. We agreed with the defendant that JID obtained by the plaintiff against him on 1 December 2015 was an irregular judgment. The defendant is entitled as a matter of right to set aside the JID. We allowed the appeal with costs of RM15,000 here and below subject to allocator fee. The deposit is refunded to the defendant.

[18] We had read the learned judge's grounds of judgment. At paras 20–30, the learned judge dealt with the issue of whether the JID is regular judgment. It is not disputed that in the defendant's case, the service of the cause papers was left at his residence in South Africa. The defendant's case is that the service of the cause papers on him was irregular as they were not served on him personally. The defendant relied on O 10 r 1 of the Rules of Court 2012. The learned judge agreed with the plaintiff that cause papers need not be served personally in the case where an order to serve out of jurisdiction has been granted. The learned judge referred to O 11 r 5(1) which says that O 10 r 1 applies where notice is served out of jurisdiction. However, O 10 r 1 is subject to the provisions of O 11 r 5 and sub-r (3) does not require a notice of a writ to serve personally.

[19] The learned judge had referred to sub-r (5) which says that 'official certificate' stating that a notice of a writ has been served on a person personally, or in accordance with the law of the country in which service was affected shall be evidence of the facts so stated. Subrule (6) says that an 'official certificate' by the Minister stating that the notice of the writ has been duly served on a

A specified date in accordance with a request made under r 7 shall be evidence of that fact.

[20] In the instant case, the learned judge found that the plaintiff had relied on an email sent by the Third Secretary at the Malaysian High Commission in Pretoria, South Africa. It says that service was affected at the residence of the defendant and that a member of his family accepted the notice of writ. Counsel for the plaintiff submitted that the said email is a 'document' within the meaning of O 11 r 5(7) and is deemed to be such certificate. The defendant argued otherwise and that the said email clearly shows that the cause papers were not personally served on the defendant as he was not at home at the material time. He was not in South Africa between 1–26 July 2015. He also submitted that there was no proof of service of document furnished by the Sheriff or the process server. He said the 'email' of the Third Secretary is vague with no acknowledgment.

[21] Having considered the argument, the learned judge held that the service was regular and rejected the defendant's argument that service must be affected personally on the defendant. The learned judge gave his reason as follows:

(a) O 10 r 1 of the Rules of Court 2012 is subject to O 11 r 5(3) which states that a notice of writ need not be served personally as long as it is served in accordance with the law of the country in which service is effected;

(b) the case cited by the defendant, the South African court noted that one of the modes of service is by leaving a copy thereof at the place of business of the said person;

(c) similar to O 62 r 6 which states that non-personal service can be affected by leaving the document at the proper address of the person to be served. Order 62 r 6 does not require personal service unless there is an express provision to that effect;

(d) there is evidence of service that on 3 November 2015, the deputy registrar of the High Court of Sabah and Sarawak issued a letter stating that all the cause papers were successfully served at the address of the defendant;

(e) the email from the Third Secretary at the Malaysian High Commission states that the service was accepted by a member of the defendant's family at the said address;

(f) the defendant had not challenged the authenticity of the said email;

(g) the form of certificate by a consular officer is not prescribed in the Rules of Court 2012; and

(h) the said email accepted as certificate by the consular officer.

[22] Based on the above reasons, the learned judge satisfied that the service was properly affected on the defendant and that the JID is regular. A

[23] The defendant submitted that the learned judge failed to appreciate that pursuant to O 10 r 1(1) read together with O 11 r 5(1) and (3) of the Rules of Court 2012, in the event a notice of writ is not served in accordance with O 10 r 1(1), the plaintiff bears the burden of proving that the notice of writ was served on the defendant of which there was no evidence adduced by the plaintiff to prove that the writ of summons was served on the defendant in accordance with the law of the country in which service is affected. B C

[24] The defendant also submitted that the learned judge failed to appreciate that the email from the Third Secretary at the Malaysian High Commission in Pretoria, South Africa is not a document purporting to be an official certificate stating that the notice of writ was served on the defendant personally or in accordance with the law of the country in which service is affected. D

[25] The deputy registrar of the High Court at Sabah had on 12 April 2015 requested the assistant of the Secretary General, Ministry of Foreign Affairs Malaysia to serve the writ of summons with statement of claim on the defendant at the defendant's address in South Africa. The request was made pursuant to O 11 r 6(6) of the Rules of Court 2012 ('the ROC'). E F

[26] Order 11 of the ROC is the governing procedure for service of process out of jurisdiction. Order 11 r 6(6) of the ROC says:

> The documents duly lodged under paragraph (3) shall be sent by the Register to the Secretary General of the Ministry of Foreign Affairs with a request that the Secretary General arranges for the writ to be served in the manner referred to in paragraph (3) or, where an alternative manner is indicated, by any of the manner as is most convenient. G

[27] Paragraph (3) of r 6 of the ROC says: H

> Where a person intends to serve notice of a writ in any country —
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> (a) through the judicial authorities of that country under paragraph (1);
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> (b) through a Malaysian consular authority under paragraph (1) or (2); or
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> (c) through the government of that country under paragraph (2), I
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> That person shall lodge in the Registry a request in Form 10 for service of notice of the writ by that method, together with a copy of the notice and an additional copy thereof for each person to be served.

[28] In the instant case, service of the writ of summons with statement of claim was done through a malaysian consular authority in that country (see: paras (1) or (2) of rule 6 of the ROC). In the present case is South Africa. Service of notice of writ abroad is provided under O 11 r 5 of the ROC. Order 11 r 5(3) says that:

> A notice of a writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is affected.

[29] Order 11 r 5(5) of the ROC further says that:

> An official certificate stating that a notice of a writ as regards which rule 6 has been complied with has been served on a person personally, or in accordance with the law of the country in which service was affected, on a specified date, being a certificate —
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> (a) by a consular authority in that country;
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> (b) by the government or judicial authorities of that country; or
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> (c) by any other authority designed in respect of that country under The Hague Convention,
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> shall be evidence of the facts so stated.

[30] Paragraph (6) says that:

> An official certificate by the Minister stating that the notice of a writ has been duly served on a specified date in accordance with a request made under rule 7 shall be evidence of that fact.

[31] Paragraph (7) says that:

> A document purporting to be such a certificate as is mentioned in paragraph (5) or (6) shall, until the contrary is proved, be deemed to be such a certificate

[32] In the grounds of judgment, the learned judge agreed with the requirement of official certificate under O 11 r 5(5) of the ROC as evidence of service of the documents on the defendant. The plaintiff in this case did not produce a certificate. It produced an *email* from the High Commission of Malaysia in Pretoria. With regard to this issue, we noted that the learned judge chose to place the burden on the defendant to challenge the authenticity of the said email. The learned judge held that the form of certificate by a consular officer is not prescribed in the ROC 2012. As the authenticity of the email is not challenged, therefore, he did not see why it cannot amount to a certificate by the consular officer in question. In other words, the learned judge accepted the submission of the plaintiff that the email is the 'official certificate' as mentioned in O 11 r 5(5) of the ROC therefore, he was satisfied that the service

was properly affected on the defendant and the JID is regular.

[33] The *email* dated 9 July 2015 from Zaharizal Zainol, the Third Secretary in Pretoria contains the following message:

> Sukacita dimaklumkan bahawa dokumen saman berkaitan telah berjaya disampaikan ke alamat defendan seperti yang tertera. Untuk makluman defendan tidak berada di rumah ketika dokumen tersebut diserahkan kerana keluar bekerja. Namun salah seorang daripada ahli keluarga beliau telah menerima bagi pihak defendan dokumen yang diserahkan.

[34] The learned judge held that the email amounts to a certificate. He based his decision on O 11 r 5(7) of the ROC 2012, which states that a document purporting to be such a certificate as is mentioned in para (5) or (6) shall, until the contrary is proved, be deemed to be such a certificate.

[35] We did not agree with the learned judge's view. His decision in the court below fell into error in making this finding. In our view, there is a blatant disregard of the words 'official certificate' as provided under O 11 r 5(5) of the ROC. One of the ways to prove that service was affected in accordance with the law of the country in which service is affected is to produce a certificate to that effect. It must have been the intention of the Rule Committee to provide for official certificate as proof of service was affected in accordance with the law of the country. *Oxford Advanced Learner's Dictionary* defined 'certificate' as an 'official document that may be used to prove that the facts it stated are true'. *Osborn's Concise Law Dictionary* (6th Ed) defined 'certificate' as 'a statement in writing by a person having a public or official status concerning some matter within his knowledge or authority'. Obviously, the email is not the official document.

[36] As alluded to earlier that the request for the assistant of the Secretary General, Ministry of Foreign Affairs Malaysia to serve the writ of summons with statement of claim on the defendant at the defendant's address in South Africa was made pursuant to O 11 r 6 of the Rules of Court 2012. Our view is that, an official certificate stating that a notice of a writ as regards which r 6 has been complied with has been served on a person personally, or in accordance with the law of the country in which service was affected must be produced as evidence of the facts so stated.

[37] We are of the view that the said email dated 9 July 2015 is not the official certificate mentioned in O 11 r 5(5) of ROC 2012. The email or document was not certified and signed to state that service was effected in accordance with the law of South Africa.

[38] We do not agree with the learned judge that the email is deemed as the certificate. Our view is that the email does not state:

(a) that the notice of writ was served personally; or

(b) that the notice of writ was served in accordance with the law of South Africa.

In other words, the email confirms that the notice of writ was not served personally but it was left at the defendant's address with another person because the defendant was not home. However, the email does not go on to say that this form of service is in accordance with the law of South Africa.

[39] In contrast, a certificate is a document as the one found at p 191 of *RRT* (2) certified and signed by the Sheriff Sandton South. It was produced to prove that the provisional sentence summons was affected under r 4(1)(a)(ii) of the Uniform Rules of Court of South Africa.

[40] The certificate states that the document concerned a service provisional sentence summons. It says '*This is to certify* that on the 23 June 2016 at 14.34 at 61 Herbert Roead, Petervale, being the place of residence of the defendant Roger Bogne, a copy of the Provisional Sentence Summons (paginated 1 to 7), Annexures 'POC/1' (paginated 8 to 9) 'POC/2' (paginated 10 to 14) and 'POC/3' thereto (paginated 15 to 24), as well as the Index thereto were served 'on Ms Annelle, partner of the defendant, a person not less that sixteen years of age and apparently in charge residing there after the original document had been shown and the nature and contents explained to the said person. *Rule 4(1)(a)(ii)*'.

[41] Rule 4(1)(a)(ii) of the Uniform Rules of Court of South Africa provides as follows:

> 4 Service
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> (1)(a) service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:
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> > by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than a hotel, boarding house, hostel or similar residential building, is occupied by more than one person or family, 'residence' or 'place of business' means that portion of the building occupied by the person upon whom service is to be effected.

[42] The failure to state in the email that the service was affected was in

accordance with the law of South Africa in our view is fatal. We also agreed with the defendant that no expert evidence was led by the plaintiff to show that despite this absence of a certificate confirming that service was effected in accordance with the law of South Africa that the service was in fact done in accordance with the law there.

[43] The learned judge erred in placing the burden on the defendant to prove that services was not done in accordance with the law in South Africa. The burden only shifts to the defendant once the plaintiff complies with O 11 r 5(5) of the ROC and produces a document from any one of the authorities mentioned in r 5(5)(a)–(c), stating:

(a) that the notice of writ has been served on a person personally; or

(b) that the notice of writ has been served in accordance with the law if the country in which service was effected (in this case, the law of South Africa).

[44] The email provides neither one of the two alternative confirmations required. Our view is that the email cannot be said to be a document which purports to be an O 11 r 5(5) certificate. The service of the notice of writ was irregular. The JID ought to have never been entered by the High Court at Labuan in light of this irregular service.

[45] It is trite law that where a JID can be proved to be null and void on the grounds of illegality or jurisdictional error it has to be set aside ex debitio justitiae. The governing principle on the powers of the court to set aside JID can be clearly seen in the judgment of the Supreme Court in the case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75. In *Badiaddin*'s case the Federal Court discussed the inherent jurisdiction of the High Court to set aside its own order where it can be proved to be null and void on the ground of illegality or lack of jurisdiction:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice.

[46] The Federal Court in *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36; [1996] 1 CLJ 241 at p 247, held that:

> It is elementary that an *irregular judgment* is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justicia, that is to say, irrespective of the merits and without terms.

[47] We were satisfied that the JID was irregularly obtained and the defendant is entitled as a matter of right to have the JID set aside. The defendant's appeal is allowed. We did not think it is necessary for us to deal with other grounds raised by the defendant.

Appeal allowed with costs of RM15,000 here and below subject to allocator fee.

Reported by Dzulqarnain Ab Fatar